Filed 5/21/07 P. v. Johnson CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROMEL DAVON JOHNSON, Defendant and Appellant.	B186191 (Los Angeles County Super. Ct. No. BA227886)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo. Graves, Chief Assistant Attorney General, Pamela C. Hamanaka Senior Assistant Attorney General, Paul M. Roadarmel and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Romel Davon Johnson appeals his convictions for multiple murders, robbery, burglary and conspiracy to commit murder in two factually distinct cases that were tried together. Johnson contends the trial court erred in: (1) denying his motion to sever the two sets of counts concerning each separate case; (2) failing to exclude evidence of the his statements to police concerning his lifestyle; and (3) refusing his request to instruct the jury on the offense of accessory after the fact.

As set forth more fully below, Johnson has not demonstrated the court abused its discretion in denying his severance motion as the charges were properly joined, the evidence presented as to each incident was equally strong and neither was unduly inflammatory. In addition, Johnson has not shown any abuse with respect to the admission of his statements to police, nor has he demonstrated that accessory after the fact instructions were warranted. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Browning Boulevard Crimes (Counts 62-64)

On April 13, 2000, about 10:30 a.m., David Soto stood on the front porch of his duplex near the intersection of Browning Boulevard and Budlong Avenue when he heard a number of gunshots. Soto turned towards the direction of the sound and saw a person running towards a green SUV parked on Budlong Avenue. The person got into the SUV, which drove away at a high rate of speed. Soto observed two African-American males in the SUV. (Hereinafter known as the "Browning Boulevard Crimes.")

Shortly thereafter, the police and paramedics arrived at 1167 Browning, which is the area claimed by the Rolling 30s Crips gang. They found two young men, Omar Reed and Jermaine Fields, lying on the ground bleeding from fatal gunshot wounds.[1]

---

[1] Witnesses stated that neither Reed nor Fields was a gang member.

Soto later identified the green SUV from a photograph. The SUV was owned by a woman who had been dating Johnson. Johnson who was a member of the Rolling 20s Blood gang, sometimes borrowed the SUV.[2]

Milton's Restaurant Crimes (Counts 1-4)

On the morning of February 11, 2002, Rodney Tomlin and Emard Peart were at Milton's Caribbean Restaurant, where they worked as cooks. At some point, Carl Scott, a handyman who did odd jobs there, knocked on the side door. When Tomlin opened the door, three armed African -- American men, later identified as Jonathan Bolden, Tavares Stefin, and Eddie Williams entered the restaurant behind Scott.[3] Tomlin jumped out a nearby window and hid in the crawl space underneath the restaurant.

Bolden, who was wearing a red bandana, pointed a gun at Peart and Scott and told them to get down on their knees. Bolden told the men they had come for marijuana and money. Peart and Scott gave them money from their wallets. Peart saw Bolden talking on a two-way radio. Peart could hear a voice coming from the radio, telling Bolden to go

---

[2] Two days before the Browning Boulevard Crimes a member of Johnson's gang, Kevin Moguel, also known as G-Kev, died from multiple gunshot wounds. Police suspected Moguel had been killed by the rival Rolling 30s Crips gang.

[3] Bolden, Stefin, and Williams were members of "Every Woman's Fantasy" an African-American gang based in the San Fernando Valley. Johnson became acquainted with them at some point. On February 10, 2002, Boldin, Stefin, Williams and several others including Bolden's girlfriend Diamond Dixon, planned to commit a robbery the next day at Milton's Restaurant. At approximately 11:31 p.m., that evening Johnson called Dixon. A few minutes later, somebody using Dixon's telephone, possibly Bolden, called Johnson's cellular telephone. At 5:15 a.m., on February 11, Bolden used Dixon's cellular telephone to call Johnson's cellular telephone. Shortly thereafter, Bolden, Stefin, and Williams left the hotel where they had been staying to go to Milton's Restaurant. At 7:21 a.m., somebody using Johnson's cellular telephone called Dixon's cellular telephone.

look in the storage room. One of the robbers took Peart to the cash register, but Peart was unable to open it and they returned to the kitchen.

One of the robbers stood in the passage leading to the storeroom. At some point, Scott ran towards the storeroom and Peart heard the sounds of a struggle and then several gunshots. Peart escaped and ran to get help. Scott, who received multiple gunshot wounds, was pronounced dead at the scene.

At about 8:30 a.m. Johnson called Dixon on her cellular telephone. During the conversation, Johnson said that he was taking Bolden to the hospital.

About 10 minutes later a security guard in the emergency room of the California Hospital, saw a silver car and a brown car pull up to the hospital. The passenger in the brown car, Bolden, had a serious neck injury. The guard took him inside the hospital. When the guard returned to the emergency room entrance, he saw the driver of the brown car, an African-American male, talking to the driver of the silver car. The driver of the brown car then got back into his vehicle and drove away. The driver of the silver car told the guard that a passenger in his car, Williams, had been shot. Williams was pronounced dead on arrival. The driver of the silver car was arrested.[4]

Later that morning Johnson spoke with Dixon over the telephone and told her what had occurred inside the restaurant. He told her Scott came up behind Bolden and cut his throat. Scott then went after Williams, and Bolden began shooting. Johnson said he was outside the restaurant when this was occurring and heard the shots being fired. Johnson said he carried Bolden to the car while Stefin carried Williams to his car. Johnson told Dixon that he had some of the guns used during the robbery.

Johnson made arrangements with Dixon to meet and take the guns used during the robbery. Approximately four days after the crimes, Dixon and several other people went in a van to a 7-Eleven. An African-American male drove-up and met Dixon at the

---

[4] Police took Peart to California Hospital where he identified Bolden as one of the assailants.

7-Eleven. Dixon returned to the van with a pillowcase. Dixon later gave the pillowcase to someone in a black car.

Johnson's Statements to Police

When police arrested Johnson on September 16, 2002, they asked him about the Browning Boulevard Crimes and the Milton's Restaurant Crimes.

With respect to the Browning Boulevard Crimes detectives told Johnson that a friend of his had identified him as being involved in the shooting, and Johnson replied, "Well, yeah." In his interview with the police, Johnson claimed he did not see anybody get shot and denied being the shooter. He also denied knowing the shooter, "Crazy B,"[5] was going to shoot anybody. Johnson said that Crazy B told him to drive somewhere and then told him to park. Johnson did not get out of the SUV and could not see from his position. Johnson heard gunshots. Crazy B ran towards the car with his "hoodie up" and jumped into the car and told Johnson to drive. According to Johnson, Crazy B said he had seen some Rolling 20s gang members, and that he had shot them. Crazy B said he did the crime for G-Kev.

Johnson told police he did not know that Crazy B had a gun when he first entered the vehicle. However, he saw a black steel automatic weapon when Crazy B returned.

Police also questioned Johnson about the Milton's Restaurant Crimes. Johnson told police that, at some point, Johnson met Bolden, Diamond Dixon, and Williams. Johnson heard them discussing robbing markets or businesses and that he could be involved in one of them to earn money for an attorney.

---

[5] Marquis Rangel was known as "Baby Crazy B" or "Crazy B." Rangel was a member of the Rolling 20s gang. Rangel had a tattoo listing members of the Rolling 20s who had been killed; one of the names listed was G-Kev.

Williams told Johnson about the robbery planned at Milton's. Bolden and Williams took Johnson to show him the restaurant. Williams told him that Jamaicans at the restaurant were selling drugs. According to Johnson, he told Williams and Bolden he would not participate in the robbery but would "watch [their] back[s]."

The day before the planned Milton's robbery, Johnson met up again with Williams and Bolden. They asked Johnson if he was still planning on being involved in the robbery, and he told them, "'Yeah, I'm still with it.'" They told Johnson they were planning to do the robbery the next day and asked if he would be ready. Johnson replied, "'I'm gonna be ready.'" Johnson, however, reiterated that he was not going into the restaurant. They gave Johnson a walkie-talkie to be used the next day.

The next morning Johnson was awakened by a telephone call from Bolden at 6:30 or 7:00 a.m. Johnson was told the others were at the restaurant. Johnson drove to the restaurant and saw their car, but did not see anybody because they were already inside. Johnson contacted the others using the walkie-talkie and was told, "We on." Johnson replied, "'Okay. I'm on. I'm watching.'" Johnson circled the block several times and did not stop his car or get out of his car.

Not long thereafter, Bolden called Johnson over the walkie-talkie and told Johnson to come to the restaurant immediately. Johnson saw Bolden walk to the car while holding his neck, which was bleeding profusely. Johnson drove Bolden to the hospital. During the car ride, Bolden told Johnson, "'I wasn't looking, the motherfucker grabbed a machete, hit me in the neck, I just started busting.'" Johnson also saw Williams come out of the restaurant and get into another car. The other car followed Johnson to the hospital.

After Bolden went into the hospital, Johnson noticed Bolden left two guns in his car. The person who had driven Williams to the hospital had placed a rifle in Johnson's car. The guns were placed in a pillowcase. About a week after the robbery, Johnson delivered the guns to Dixon at a 7-Eleven.

The Trial

Johnson was charged in a multi-count indictment along with two other defendants.[6] Johnson was charged with murder in counts 1 and 2, second degree robbery in count 3, and second degree commercial burglary in count 4. Counts 1-4 pertained to the shooting and robbery at Milton's Restaurant. In counts 62 and 63, Johnson was charged with murder and in count 64 with conspiracy to commit murder. Counts 62-64 all arose out of the Browning Boulevard Crimes. Various enhancements and circumstances, including a firearms and gang enhancements were also alleged.

Prior to trial Johnson filed a motion seeking to sever counts 1-4 from counts 62-64, arguing that because the evidence in each case was not cross-admissible, and the charges and evidence alleged in connection with counts 1-4 were unduly inflammatory severance was required in the interests of justice. The prosecutor responded that although the evidence was not cross-admissible, each case presented similar kinds of evidence and charges and that Johnson's role in each group of crimes was about the same. The prosecutor asserted that neither case was stronger than the other. The trial court agreed, and in denying the motion noted that although the crimes were unrelated the theories in each case, in terms of Johnson's role in the crimes, were very similar and that neither incident seemed more inflammatory than the other. The court also noted that the jury would be instructed to consider and judge each crime separately and independently from the others.

After the presentation of the evidence, the jury convicted Johnson on all counts and found all of the enhancements true.

Johnson timely appeals.

---

[6] Johnson was tried separately from the others.

DISCUSSION

I. The Court Properly Denied the Motion to Sever the Charges.

On appeal, Johnson complains the court erred in failing to grant his motion to sever counts 1-4, Milton's Restaurant Crimes from counts 62-64, the Browning Boulevard Crimes. He asserts counts 1-4 should have been severed in the interests of justice because the evidence concerning those crimes was unduly inflammatory and evidence related to the Milton's Restaurant Crimes was "far stronger" than that related to the Browning Boulevard Crimes. As we shall explain, we find no reversible error.

"'The law prefers consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Penal Code section 954 contains the statutory rules governing "joinder" and "severance" of criminal counts. Section 954 provides, in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the *same class of crimes* or offenses, under separate counts, . . . [provided,] that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (Pen. Code, § 954; italics added.)

Johnson does not contest consolidation of these charges for trial was proper under Penal Code section 954 in the first instance because the offenses charged in counts 1-4 (murder, robbery and burglary) and counts 62-64 (murder and conspiracy to commit murder) are the same class of crime. Both of these incidents involved offenses of the same class of crime because they all involve a common element of assault on the victim. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243 [robbery and murder are same class of crime].)

Where, as here, the threshold statutory requirements for joinder are met, the defendant may nonetheless be entitled to severance of charges in the interests of justice. (Pen. Code, § 954; *People v. Sapp* (2004) 31 Cal.4th 240, 257-258; *People v. Williams* (1984) 36 Cal.3d 441, 447 ["The determination that offenses are 'joinable' under section 954 is only the first stage of the analysis because section 954 explicitly gives the trial court discretion to sever offenses or counts in the 'interests of justice and for good cause shown' . . . . Refusal of severance may be prejudicial if discretion is abused."; citing *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135.) Accordingly, defendant can only predicate error in the denial of severance on a clear showing of potential prejudice. (*People v. Stanely* (2006) 39 Cal.4th 913, 934; *People v. Manriquez* (2005) 37 Cal.4th 547, 574.) We review the trial court's denial of defendant's severance motion for an abuse of discretion. (*People v. Stanely, supra*, 39 Cal.4th at p. 934, *People v. Manriquez, supra*, 37 Cal.4th at p. 574, and cases cited; *People v. Sapp, supra*, 31 Cal.4th at pp. 257-258.)

Determination of the issue is a "highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case." (*People v. Williams, supra,* 36 Cal.3d at p. 452.) This court examines a pretrial ruling on consolidation on the record before the court at the *time of the motion*. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1244.)

Several criteria have emerged to assist the courts in evaluating whether the trial court erred in denying a motion to sever. These "severance" criteria include whether: (1) evidence on the crimes to be jointly tried would be cross-admissible in separate trials; (2) certain charges or evidence are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case or with another "weak" case so the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (*People v. Kraft, supra*, 24 Cal.4th at p. 1030.)

Neither below nor before this court has anyone asserted that the evidence relating to counts 1-4 and counts 62-64 was cross-admissible.[7] These incidents are entirely unrelated save for the fact that Johnson was involved in both of them. However, the lack of cross-admissibility does not by itself demonstrate sufficient prejudice to warrant severance. (*People v. Kraft*, *supra*, 24 Cal.4th at p. 1030 [a finding of cross-admissibility dispels any inference of prejudice; "[c]onversely, however, the absence of cross-admissibility does not, by itself, demonstrate prejudice"].) In fact, Penal Code section 954.1 (added in 1990 by Proposition 115), permits joinder even in absence of cross-admissibility.[8] (See *People v. Manriquez*, *supra*, 37 Cal.4th at p. 574.) Thus, the lack of cross-admissibility alone does not prove prejudice.

In addition, we cannot agree that the charges or the evidence presented in connection with counts 1-4 are unusually inflammatory or unduly prejudicial. The charges themselves, murder, robbery and burglary, are not particularly inflammatory. (See *People v. Balderas* (1985) 41 Cal.3d 144, 170, 174.) As for the evidence, both incidents involved the shooting of multiple victims, and in neither incident was Johnson the shooter. In fact, his role in each crime was similar; he drove the getaway vehicle. Both incidents were gang related. While there were eyewitnesses to the robbery alleged in counts 1-4, the description of the robbery was not particularly inflammatory and there was no eyewitness testimony concerning the murder counts.

---

[7] Likewise this is not a case which involved consolidation of a capital and non-capital case; and consequently the final severance factor is not at issue here.

[8] Penal Code section 954.1 provides, in pertinent part: "in cases in which two or more different offenses of the same class have been charged together in the same accusatory pleading . . . evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

As for coupling a weak case with a strong case causing a "spillover" effect, in our view the evidence demonstrating Johnson's culpability for each incident was substantially equal. There were no eyewitnesses who identified Johnson as directly involved in carrying out the murders or robbery, both cases relied on Johnson's statements to the police in which he described his involvement. Moreover, the prosecutor relied on circumstantial evidence to prove counts 1-4 including testimony Johnson was the individual who dropped off Bolden at the hospital and was involved in disposing of the weapon. Circumstantial evidence was also used to prove counts 62-64, including evidence that Johnson's girlfriend's SUV was identified as driving from the scene. As such there was no substantial disparity in the strength of the evidence between the two cases which would indicate a "spillover" had occurred.

In short, Johnson has not carried his burden to prove a clear showing of potential prejudice.

This conclusion does not end the inquiry into the matter, however. Even if the trial court's ruling is correct at the time when made, this court must reverse the judgment if the defendant shows consolidation actually resulted in a "gross unfairness" amounting to a denial of due process under federal law. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 162.) Our review of the record convinces us the failure to sever these charges did not result in gross unfairness. Indeed, the jury was told to consider each incident individually and to decide each charge separately. The prosecutor informed the jury that the analysis was different as to each group of counts and discussed the factual distinctions in the incidents. There is no indication in the record that the jury expressed any confusion about crimes or charges.[9]

---

[9] This circumstance serves to distinguish this situation from that in *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1083-1084, cited by Johnson. *Bean* involved trial in which in two separate murder cases where tried together, the evidence as to each was not cross-admissible and there was a significant disparity in the evidence. (*Id*. at pp. 1084, 1087.) Moreover, during the trial the prosecutor repeatedly urged the jury to consider the two groups of charges in concert. The Ninth Circuit found the jury would

Accordingly, the court's denial of the motion to sever was not beyond the bounds of reason and did not constitute reversible error. Nor has Johnson demonstrated prejudice or gross unfairness actually resulted in denying him due process or a fair trial as to the joined counts.

II. The Court Did Not Commit Reversible Error in Admitting Johnson's Police Interview Statements.

At the beginning of the September 16, 2002, tape-recorded interview with police investigators, Johnson and the detectives discussed a number of issues seemingly unrelated to the purpose of the criminal investigation. Specifically they discussed that: (1) Johnson wore an expensive pair of shoes; (2) he drove a Mercedes-Benz; (3) Johnson had no address and had been living in hotels for the prior 10 months; (4) Johnson had fathered seven children with six different women; and (5) that he had stopped gang-banging and now made his living as a pimp. (Collectively referred to as his "lifestyle statements.") Shortly thereafter, the detectives apprised Johnson of his *Miranda* rights. Johnson waived his rights and subsequently discussed his involvement in the crimes with the officers.

Prior to trial, Johnson filed a motion seeking the exclusion of all of his statements to the police during his interview, claiming that his statements were involuntary. Specifically, he contended he was intoxicated during the interview and that prior to the interview he had been threatened by the police. The court denied the motion.

---

not likely have compartmentalized the evidence as to each and thus the court found the defendant suffered a prejudicial violation of his constitutional rights. Here, however, we can fairly assume that because the jury was properly instructed as to the consideration of the sets of charges, the jury properly compartmentalized the evidence as to each. (*Id.* at p. 1085 ["[I]f properly instructed, [the court can assume] the jury can compartmentalize the evidence rather than considering it cumulatively]."")

During trial when the prosecutor sought to play the tape-recorded police interview containing the statements concerning Johnson's lifestyle, Johnson objected, asserting that the evidence wasn't relevant. The prosecutor stated that at the point Johnson first objected (at about page 23 of the interview transcript) the matter being discussed on the tape was Johnson's prior gang involvement, and the prosecutor contended that Johnson's involvement in gangs was relevant. The prosecutor offered that there had been nothing prejudicial presented and that the probative value outweighed the prejudice. Johnson responded that "what might be prejudicial is the girlfriends he has and how many kids." The prosecutor stated that the other things Johnson discussed on the tape were "far more hardcore." The court overruled the objection noting that because Johnson had made the contention that he was under the influence during his interview, his initial statements were relevant to the voluntariness of his later statements to police.

On appeal Johnson asserts the court erred in admitting approximately the first 33 pages of his police interview because various statements he made to the police concerning his lifestyle were irrelevant, inflammatory and prejudicial and amounted to bad character evidence, inadmissible under Evidence Code section 1101. As we shall explain, the court did not err in admitting the evidence.

A. <u>Relevance and Evidence Code Section 352:</u> The trial courts have discretion in admitting evidence; the court's evidentiary rulings will not be reversed absent a finding of abuse. (*People v. Schied* (1997) 16 Cal.4th 1, 14-16.) All relevant evidence is admissible; relevance is defined as that evidence which has any tendency to prove or disprove any disputed fact that is of consequence to the determination of the action. (*People v. Carter* (2005) 36 Cal.4th 1114, 1116; Evid. Code §350.)

Preliminarily we observe that Johnson's relevance objection was broad and non-specific. Below he did not complain about *all* of the lifestyle evidence which he raises on appeal. He asserted his objection during a portion of the interview when Johnson and the officers were discussing his gang involvement. Clearly given the gang allegations in this case, Johnson's statements about his prior gang involvement were relevant. In addition, the only specific evidence Johnson mentioned during the discussion of his objection was

the evidence concerning the number of his children and his girlfriends. In our view, as the trial court properly observed given that Johnson had made a claim that statements to police were coerced and that he was under the influence during the interview, his discussion concerning his children, girlfriends and all of the other lifestyle matters that he mentions on appeal were material to the issue of whether his inculpatory statements to police were voluntary.[10] Consequently, the court did not err in overruling Johnson's relevancy objection.

Similarly we perceive no reversible error under Evidence Code section 352. Johnson did not specifically assert a section 352 objection; the prosecutor raised the issue of prejudice and Johnson merely remarked that the evidence of Johnson's girlfriends and children "might be prejudicial." Failure to assert the specific objection results in a waiver on appeal. (See *People v. Von Villas* (1992) 10 Cal.App.4th 201, 267-268.) Nonetheless, even were we to deem that Johnson's counsel's comments served to interpose a section 352 objection, we would find no error. Evidence Code section 352[11] only applies to prevent *undue* prejudice, that is, "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues' not the prejudice that 'naturally flows from relevant, highly probative evidence.'" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds by *People v.*

---

[10] At the time the defendant made this objection, he did not advise the court that he did not intend to pursue the issue of the voluntariness of the confession in front of the jury. Moreover, as the Attorney General also observes statements concerning Johnson's expensive tastes in shoes and cars were also relevant to the issue of a motive for him to be involved in the Milton's Restaurant Crimes. In addition evidence he lived in hotels for a number of months served to corroborate Johnson's statement that he received a call to participate in the Milton's incident while he was staying at a hotel.

[11] Evidence Code section 352 provides: "the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Hill (1998) 17 Cal.4th 800.) In addition, even if undue prejudice exists, it must substantially outweigh its relevance. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) This court will not disturb a trial court's exercise of discretion under Evidence Code section 352 absent a showing the court acted in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In our view the lifestyle evidence was not unduly prejudicial; and even the evidence which had some potential for prejudice, such as the references to the number of children and girlfriends and his earning a living as a pimp, was not overwhelming and did not substantially outweigh the relevance of the evidence to the issue of whether Johnson's interview was voluntary.

B. Evidence Code Section 1101. Johnson also claims the lifestyle evidence should have been excluded as bad character evidence under Evidence Code section 1101. He did not, however, specifically assert Evidence Code section 1101 before the trial court, and thus has waived that objection. (*People v. Thomas* (1992) 2 Cal.4th 489, 520.) A general objection on relevancy grounds is not sufficient to preserve an objection under section 1101. (*People v. Clark* (1992) 3 Cal.4th 41, 126, citing *People v. Williams* (1988) 44 Cal.3d 883, 906.) Nonetheless, even were we to consider the merits of the claim, we would reject it.

"[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) Nevertheless, "evidence that a person committed a crime, civil wrong, or other act" is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) "We review the admission of evidence under Evidence Code section 1101 for an abuse of discretion." (*People v. Memro* (1995) 11 Cal.4th 786, 864.)

As discussed elsewhere herein, the lifestyle evidence was relevant to prove another fact, specifically, it served to contradict any claim that Johnson's confession was involuntary. In addition, evidence concerning his tastes and lifestyle was relevant to the issue of motive. Furthermore, in his closing argument Johnson's counsel used the evidence of his status as a pimp to argue that Johnson was no longer an active and important gang member when the Browning Boulevard shooting occurred; he sought to suggest that Johnson, rather than serving as "shot-caller" or decision maker for the shooting, was only the driver, that he was along for the ride and was taking his orders from the shooter Crazy B. Thus, we conclude admission of the lifestyle evidence was not an abuse of discretion in light of Evidence Code section 1101.

In view of these circumstances and the evidence against Johnson, we find no violation of Johnson's constitutional rights set forth in federal law under *Chapman v. California* (1967) 386 U.S. 18 or in state law under *People v. Watson* (1956) 46 Cal.2d 818, 836. Likewise, this evidence did not render Johnson's trial fundamentally unfair or in violation of due process. (See *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.)

III. The Court Did Not Err in Refusing to Give Instructions on Accessory After the Fact.

On appeal Johnson asserts the court erred in refusing to instruct the jury on the theory of accessory after the fact. Specifically Johnson asserts the instruction was required because: (1) the theory of his defense was that he was guilty, at most, of being an accessory after the fact; and (2) accessory after the fact was a lesser included offense to those charged in counts of 62-64, the Browning Boulevard Crimes. We find no error.

In his opening statement Johnson's counsel explained to the jury that the evidence presented at trial would show that he had no criminal involvement in the crimes. As for the Browning Boulevard Crimes he postulated the evidence would show that he was not involved in the shooting; he asserted evidence existed that another person, a female, had

been observed quickly walking away from the area of the shooting crime and implied that perhaps she was the shooter. He also stated the evidence would be presented that people, other than Johnson, had access to the green SUV observed fleeing from the scene. As for the Milton's Restaurant Crimes, Johnson told the jury he had no culpable involvement in the crimes, but instead suggested that he was simply being a "Good Samaritan" in driving an injured person to the hospital, and that he passed the guns along to a third party because they did not belong to him.

During the jury instruction discussion, Johnson's attorney requested the court instruct the jury on the crime of accessory after the fact. The court denied the request observing the crime of accessory after the fact was a lesser related offense and under current law defendants were not entitled to the instructions on lesser-related offenses, where as here the prosecutor had not consented to such an instruction. Johnson acknowledged that accessory after the fact was a lesser related offense to the charges. He did not assert either of the contentions he is now making on appeal, that is, he neither argued he was seeking the instruction based on a claim that the theory of his defense was that he was an accessory after the fact, nor did he argue the instruction was warranted because it was a lesser included offense.

Johnson's closing argument echoed the themes he had introduced during his opening statement. He argued the prosecution had failed to present sufficient evidence of his criminal involvement, i.e., that he was not present or that his actions lacked criminal intent or were innocent.

A. <u>Accessory After the Fact as a Defense Theory</u>.

Preliminarily we observe that Johnson did not specifically request the accessory after the fact instruction based on the claim that it constituted his defense. But even if he had, the court would have properly rejected it.

The offense of being an accessory after the fact is a lesser related offense to murder and robbery. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 291-292.) As the trial court correctly pointed out, the law does not require jury instructions on lesser

related offenses. (See, e.g., *Hopkins v. Reeves* (1998) 524 U.S. 88, 96-98 [instruction on lesser included offenses in capital cases, but not on lesser related offense, constitutionally compelled]; *People v. Birks* (1998) 19 Cal.4th 108, 135-137 [no instruction on lesser related offenses in the absence of prosecutorial agreement arises under California Constitution].) Accordingly, the trial court properly refused to give a jury instruction on the theory of accessory after the fact.

Moreover, a contrary conclusion is not compelled by Johnson's argument on appeal that he was entitled to the instruction because it constituted the theory of his defense that, at most, he is guilty only of being an accessory after the fact. We reject his attempt to do indirectly what is precluded directly. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1064-1065 [defendant not entitled to instruction on lesser related accessory liability offense even if supported by the evidence]; see also *People v. Schmeck*, supra, 37 Cal.4th at p. 292 [court's refusal to instruct on accessory after the fact held to not deprive the defendant of the opportunity to present a defense].) At any rate, even without the instruction, Johnson was free to argue the theory to the jury. The fact he did not argue he was guilty of being only an accessory after the fact, and instead argued defense theories which focused on his lack of culpability and factual innocence serves to undermine his claim on appeal that he was entitled to a specific instruction on the offense on the grounds that it functioned as his defense.

B. Accessory After the Fact as a Lesser Included Offense.

In his opening brief, Johnson posits that two tests exist to determine whether an offense is lesser included. *(People v. Cook* (2001) 91 Cal.AppAth 910, 918.) Under the statutory elements test, a crime is necessarily included in a greater offense if the statutory elements of the greater offense include all of the elements of the lesser offense. *(People v. Moon* (2005) 37 Ca1.4th 1, 25.) Johnson conceded that, under this test, being an accessory after the fact is not a lesser offense to conspiracy.

Under the second test, an offense is necessarily included in a greater offense if the allegations in the information include language that describe the offense in such a manner that, if the charged offense is committed as specified, the lesser offense is also necessarily committed. (The "pleadings test.") *(People* v. *Fenenbock* (1996) 46 Cal.App.4th 1688, 1707.) Johnson thereafter asserted the pleadings test applied in his case. Specifically he argued the offense of accessory after the fact was a lesser included offense to the conspiracy alleged in count 64 because the overt act number six as plead in count 64 ("co-conspirator got back into defendant's vehicle and defendant drove them out of rival gang territory") necessarily also established that he was an accessory after the fact.

We note that in his reply brief, Johnson states the Supreme Court in *People v. Reed* (2006) 38 Cal.4th 1224 recently rejected the use of the pleadings test to determine whether a crime was a lesser included offense. Johnson characterizes the opinion in *Reed* as holding "that the pleadings test does not provide an alternative to the statutory elements test for determination of lesser related offenses." The court's holding in *Reed* is not as broad as Johnson suggests. In *Reed* the Supreme Court considered a far narrower question, specifically they examined whether the pleadings test could be used to determine if an offense was lesser included such that it would preclude *multiple convictions* arising out of the same event. The court thereafter held: "Courts should consider the statutory elements and the accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*People v. Reed*, supra, 38 Cal.4th at p. 1231; italics in the original.) Consequently, in our view, *Reed* does not dispose of the issue in this case, because here we are considering whether the jury should have heard jury instructions concerning an *uncharged* crime based on the notion that the uncharged offense was a lesser included crime to a charged offense.

In any event, the pleadings test does not establish that being an accessory is a

lesser offense to conspiracy because the information listed six possible overt acts, and the jury only needed to find one of the overt acts to be true. (Pen. Code, § 182, subd. (b); see also *People* v. *Russo* (2001) 25 Ca1.4th 1124, 1134 [conspiracy consists of "*an* overt act"].) Thus, even under the language of the information, it was possible for Johnson to commit the conspiracy without engaging in the act listed in overt act number six. Accordingly, being an accessory after the fact would not be a lesser included offense to the conspiracy charged.

In light of the foregoing, we conclude the trial court did not err in failing to instruct the jury on the offense of accessory after the fact.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**